



ARCHER & GREINER, P.C.  
ATTORNEYS AT LAW

127116



CHRISTOPHER R. GIBSON  
*Also Member of Pennsylvania Bar*

ONE CENTENNIAL SQUARE  
HADDONFIELD, NJ 08033  
856-795-2121  
FAX 856-795-0574

Email Address:  
cgibson@archerlaw.com

Direct Dial:  
(856) 354-3077

Direct Fax:  
(856) 673-7077

www.archerlaw.com

January 21, 2008

**(Via Federal Express)**

Mr. William S. Hose, Section Chief  
State of New Jersey  
Department of Environmental Protection  
Division of Remediation Support  
Bureau of Enforcement and Investigations  
401 E. State Street  
5<sup>th</sup> Floor West  
P.O. Box 028  
Trenton, NJ 08625

RE: Margaret's Creek, Old Bridge Township, Middlesex County  
EA ID # NEA070001-434324

Dear Mr. Hose:

On behalf of our client, NL Industries, Inc. ("NL"), we would like to thank your colleagues Ed Putnam and Fred Mumford for taking the time to participate in a conference call with us regarding the Margaret's Creek Site ("Site") on January 4, 2008. The information we learned during that conference call has been very helpful to better understand the New Jersey Department of Environmental Protection's ("NJDEP") concerns and to assist NL's efforts to research the history of the activities at the Site by Liberty Trucking and others. That the conference call was so helpful confirms our belief that the meeting with the NJDEP that NL requested following receipt of the NJDEP's proposed Administrative Consent Order ("ACO") would not have been futile. We were disappointed by the NJDEP's decision not to meet with NL to discuss a cooperative relationship to address environmental issues at the Site, especially after the NJDEP initially had agreed to such a meeting. Nonetheless, NL remains hopeful that such a cooperative relationship can be arranged. We therefore renew our request to meet with the NJDEP to discuss the NJDEP's proposal that NL enter into an ACO with respect to the Site. Such a meeting would give NL the opportunity to present, and the NJDEP the opportunity to consider, new information that NL has discovered regarding the Site that bears significant relevance to the scope of the proposed ACO and who should be invited to participate.

PRINCETON OFFICE  
700 Alexander Park  
Suite 102  
Princeton, NJ 08540  
P 609-580-3700  
F 609-580-0051

FLEMINGTON OFFICE  
Plaza One  
1 State Route 12, Suite 201  
Flemington, NJ 08822-1722  
P 908-788-9700  
F 908-788-7854

PHILADELPHIA OFFICE  
One South Broad Street  
Suite 1600  
Philadelphia, PA 19107  
P 215-963-3300  
F 215-963-9999

WILMINGTON OFFICE  
300 Delaware Avenue  
Suite 1370  
Wilmington, DE 19801  
P 302-777-4350  
F 302-777-4352

NEW YORK OFFICE  
2 Penn Plaza  
Suite 1500  
New York, NY 10121  
P 212-292-4988  
F 212-629-4568

Mr. William S. Hose, Section Chief  
January 21, 2008  
Page 2

As a publicly-traded company, NL owes significant responsibilities to its shareholders. Likewise, NL is subject to regulation under Sarbanes-Oxley and other laws that impose strict requirements as to how NL evaluates, reports and establishes reserves for its liabilities. The NJDEP's proposed ACO asks NL to accept full responsibility for conducting all necessary environmental investigation and remediation at the Site, even though the nature, scope and cost of such activities presently is unknown. NL cannot blindly accept such responsibility.

The NJDEP's request that NL enter into an ACO to perform all necessary investigation and remediation apparently is based solely upon a 1972 letter in which NL indicates that Liberty Trucking was engaged to haul certain waste materials from NL's smelter facility in Perth Amboy, New Jersey. That letter, by itself, provides a poor basis from which to conclude that NL is responsible for the contamination issues that now have been identified at the Site. It provides an even poorer basis from which to conclude that NL, even if responsible for generating some of the material deposited at the Site, should be solely responsible for investigating and remediating those contamination issues.

#### **INFORMATION LEARNED BY NL AS TO SITE HISTORY**

Since receiving the NJDEP's initial inquiry about the Site in the summer of 2007, NL diligently has investigated the history of the Site to identify relevant issues and other potentially responsible parties ("PRPs"). As it turns out, much of this information is in the possession of the NJDEP or former NJDEP personnel. For example, NL has filed several Open Public Records Act requests to the County of Middlesex, the Township of Old Bridge and the NJDEP, searching for information regarding the sea wall project, the park and the former disposal site. NL also has reviewed the file provided by the NJDEP. Additionally, as a result of our recent telephone conference with Mr. Putnam and Mr. Mumford, we contacted Bernie Moore, former director of coastal engineering for the NJDEP, who provided a significant amount of relevant information.

Based upon our efforts to date, we have learned that the sea wall was constructed during the late 1960s into the early 1970s. The sea wall project apparently was a reaction to devastation caused by several hurricanes that swept through the area in the 1950s and 1960s, including the infamous "Ash Wednesday storm" of March 6-8, 1962. This information regarding the timing of construction of the sea wall alone calls into question the NJDEP's assumption that NL is responsible for contaminated materials contained within the sea wall. The letter relied upon by the NJDEP provides no information that NL used Liberty Trucking prior to 1972.

Furthermore, examination of the sea wall shows that it is constructed in part of demolition materials. Thus, there clearly was a source of materials for constructing the sea wall other than the slag generated by NL's Perth Amboy facility. Anecdotal information suggests that the demolition materials may have come from the ASARCO plant in Perth Amboy, though there certainly would have been many more sources of demolition materials from the surrounding

Mr. William S. Hose, Section Chief  
January 21, 2008  
Page 3

community. Also present in the sea wall are “pots,” curved fragments of metal materials. If the slag materials from NL’s Perth Amboy facility were the source of the materials comprising the sea wall, one would expect also to see considerable quantities of such “pots” in the slag materials discovered on-site during the remedial investigation of NL’s Perth Amboy facility. That is not the case. ASARCO’s operations also generated waste containing slag and broken battery casings, so the presence of these materials in the sea wall and elsewhere at the Site does not prove that those materials originated from NL’s facility.

Our research also has revealed that Liberty Trucking was in operation as early as the 1920s. Moreover, aerial photographs show that dumping occurred on the Site as early as 1954. This suggests that Liberty Trucking had many other customers, which casts even more doubt on the NJDEP’s ability to identify NL as the source of any materials at the Site – in the sea wall or elsewhere.

Additionally, the research we have been able to conduct up to this point in time suggests that what the NJDEP currently considers to be the “Site” historically consisted of two separate sites, with the sea wall portion being a separate site from the area where Liberty Trucking disposed of waste. Prior to construction of the sea wall, the United States Army Corps of Engineers, in conjunction with the State of New Jersey, built a levee in the same area. Records obtained from the NJDEP’s Coastal Engineering Department indicate that during the time when the sea wall was being constructed (late 1960s into early 1970s), the sea wall property was owned by Sea-Land Development Corp. According to notes from an October 23, 1968 meeting between the NJDEP’s Coastal Engineering Department and Sea-Land Development Corp., the NJDEP was aware of, and voiced no opposition to, Sea-Land Development Corp.’s plans to construct the sea wall having a core composed of clay and slag.

### **PREJUDICE TO NL FROM NJDEP’S DELAY**

Although NL has learned some important information regarding the history of activities at the Site, and NL’s research continues, there can be no doubt that the NJDEP’s decision to wait 35 years to notify NL that it considered NL responsible for performing investigatory and remedial actions at the Site has prejudiced NL. The 1972 letter from NL upon which the NJDEP relies shows that the NJDEP had knowledge of and concerns about potential contamination issues at the Site. Why the NJDEP waited 35 years to act is unclear.

What is clear is that the delay has prejudiced NL. A tremendous amount of information has been lost over the years. Unlike in 1972, Liberty Trucking and Sea-Land Development Corp. no longer are active businesses in 2007. It will be difficult, if not impossible to locate business records detailing those companies’ activities. Indeed, the operator of Liberty Trucking now is dead. The identity of Liberty Trucking’s drivers and location of Liberty Trucking’s business records is unknown. Moreover, it appears that the requirement for Liberty Trucking to submit collector/hauler reports to the State either was not enforced or those reports have been lost or discarded.

As a result, NL's ability to ascertain precisely what Liberty Trucking did with the materials picked up from NL's facility and what other businesses or government entities were Liberty Trucking customers has been compromised, if not completely prevented. Moreover, during the early to mid 1970s, Liberty Trucking may have had insurance coverage that would have paid for the cleanup. Alternatively, Liberty Trucking may have been in a position in the 1970s to indemnify NL. Unfortunately, by waiting 35 years to address what it now maintains is an imminent threat to the public health and environment, the NJDEP has deprived NL of its contribution rights against two significant parties and made the investigation, which the NJDEP has declined to pursue, far more difficult.

Furthermore, the NJDEP's delay in notifying NL of its expectation that NL take action to clean up the Site has delayed NL's ability to take action. The contamination problems at the Site undoubtedly have been exacerbated over time, especially with the presence of slag in the sea wall on the shoreline.

#### **OTHER PRPs**

Despite the loss of information occasioned by the NJDEP's delay, NL still has been able to identify a number of other entities potentially responsible for environmental issues at the Site. For example, information that NL has assembled up to this point indicates that federal, state and local government agencies participated in funding, approving and planning construction of the levee and/or sea wall. To the extent that those entities knowingly approved the use of slag in the levee and sea wall, whether as a matter of convenience or to save money (and therefore receive an economic benefit), they potentially bear liability under the Spill Act or CERCLA as parties participating in arranging for the disposal of hazardous materials.

Also, the NJDEP has issued numerous notices of violation to the Township of Old Bridge related to its improper disposal of street sweepings at the Site. One of the largest sources of ongoing lead contamination in the environment is from lead wheel weights that either are ground up or thrown off of cars onto the sides of the road. These lead-bearing products are picked up in street sweepings. Thus, it is certain that the Township of Old Bridge has contributed to contaminating areas of the Site by its improper disposal of its street sweepings. We are confused, therefore, as to why the NJDEP has allowed the Township to pursue very limited remedial activities while requiring that NL, for which the evidence of contributing to contamination at the Site is far less persuasive, sign a blank check to pursue all remedial activities at the Site.

Finally, NL has identified a significant number of additional PRPs from among the customers of NL's Perth Amboy facility. These customers disposed of batteries and other lead-bearing waste by sending it to NL's smelter facility.<sup>1</sup> Many of these are the same companies that

---

<sup>1</sup> These generators include Johnson Controls, Inc.; EnerSys, Inc.; Exide; Dupont; Delco Electronics; C&D Technologies; Krentzman; Beaver Smelting & Refining Company; Carborundum; WIMCO; Billiton Trading Company; Associated Metals & Minerals Corp.; Capper Pass & Son, Ltd.; East Penn Manufacturing Company;

Mr. William S. Hose, Section Chief  
January 21, 2008  
Page 5

sent lead-bearing waste to other of NL's smelter facilities, as well, including the facility in Pedricktown, New Jersey. Many have participated at some level in helping to fund the cleanups at these other smelter sites.

### **NL's PROPOSAL**

More time is needed to investigate the history of the area and to find PRPs, and NL will continue its diligent investigation into identifying these other parties. During that time, NL will be willing to perform a remedial investigation related to the disposal site for Liberty Trucking, as well as implement stricter security measures at the Site. This is a win-win situation for NL and NJDEP. If NL were to sign the version of the ACO that the NJDEP has proposed, the next step would be to perform the RI anyway. The NJDEP would not be waiving its rights or ability to pursue action in the future. We are confused as to the rationale underlying the NJDEP's unwritten policy that it will enter into RI-only ACO only with a group of at least five PRPs – not with a single PRP. The NJDEP obviously does not apply that policy strictly, as NL entered into an RI-only ACO with respect to its Perth Amboy facility. That process has worked very well and it is our understanding that the NJDEP is satisfied with the progress at that Site. Moreover, as noted above, NL has identified other PRPs that the NJDEP can request to join in the ACO along with NL.

We would appreciate the opportunity to meet with you and other representatives of the NJDEP to discuss the merits of NL's proposal. We look forward to hearing from you soon.

Very truly yours,



CHRISTOPHER R. GIBSON

CRG:CNM

cc: Edward Putnam  
Fred Mumford